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IN THE

Supreme Court of the United States

October Term, 1970.

No. 699

CHARLES MAJURI and JOSEPH CARUANO,
Petitioners,

v.

UNITED STATES OF AMERICA, JOHN N. MITCHELL, Attorney General of the United States, FREDERICK B. LACEY, United States Attorney for the District of New Jersey and JOHN DOE, Any Federal Law Enforcement Officer,
Respondents.

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES OF AMERICA, JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, FREDERICK B. LACEY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY AND JOHN DOE, ANY FEDERAL LAW ENFORCEMENT OFFICER,
Respondents.

PETITION FOR WRIT OF CERTIORARI FOR THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPLICATION.

Petitioners, CHARLES MAJURI and JOSEPH CARUANO, seek a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit,

entered on August 17, 1970, which dismissed their appeals from a decision by the Honorable Leonard I. Garth, Judge of the United States District Court for the District of New Jersey, and to review so much of the order of the Circuit Court of Appeals as denies the Petitioners' Motions for Injunctive Relief pending the disposition of this action. *Reference to opinion below.* Judge Leonard I. Garth's decision of May 7, 1970, has not been officially reported, and is set out at (14a) in the Petitioners' Appendix. The opinion of the Court of Appeals has not yet been officially reported, and is set out in (21a) of the Petitioners' Appendix. The Judgment of the Court of Appeals is reprinted at (30a) of Appendix.

JURISDICTIONAL STATEMENT.

Judgment of the Court of Appeals was entered on August 17, 1970. The decision of Judge Leonard I. Garth denying Petitioners' Application for the Convening of a Three-Judge Court and for Preliminary Injunction, and dismissing their Complaint in Equity was entered on May 7, 1970. The jurisdiction of this Court is invoked on Certiorari under Title 28 U. S. C. § 1254(1), because the decision of the Third Circuit Court of Appeals presents important questions of Federal Constitutional and statutory law and jurisdiction which, in our view, are in conflict with the applicable decisions of this Court and other United States Courts of Appeals, and presents questions which should now be definitively settled by this Court since the decision of the Third Circuit Court of Appeals so far departs from the accepted and usual course of judicial proceedings and affirms such a departure by the lower Court as to call for the exercise of this Court's power of supervision (Rule 19).

QUESTIONS PRESENTED.

1. Does not the affirmal by the Third Circuit Court of Appeals of an order by a single District Court Judge, which dismissed the petitioners' cause of action, brought under Title 28 U. S. C. §§ 2282 and 2284, wherein they had sought the convening of a Three-Judge Court to restrain the enforcement against them of an allegedly unconstitutional act of Congress, when the single Judge had determined that a substantial question of the Constitutional validity of the act had been raised, draw the Circuit into conflict with decisions of other Circuits on the important question of the jurisdictional requirements for convening Three-Judge Courts?

2. Does not the Circuit Court's affirmal of the order conflict with the applicable decisions of this Court on the question of when a Three-Judge Court must be convened and the responsibilities and power of a single Judge, when injunctive relief is sought, seeking to determine the constitutionality of acts of Congress?

3. Does the sanctioning by the Circuit Court of the dismissal of a Complaint by a single District Court Judge, the jurisdiction over which action Congress has specifically provided must be exercised by a Three-Judge Court, so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision?

4. Does the sanctioning by the Circuit Court of the dismissal of the Petitioners' Complaint in Equity, when despite proper service of that Complaint on all parties Defendant, no responsive pleading was ever made by or on behalf of any of the Defendants, so far sanction a departure by the Lower Court from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. Federal Constitutional Provisions:

(a) "The judicial power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish" (Art. III, Sec. 1);

(b) "The Congress shall have power to constitute . . . tribunals inferior to the supreme Court; and to make all laws which shall be necessary and proper for carrying through the foregoing powers" (Art. I, Sec. 8(9) and (18)).

(c) "Judicial power shall extend to all cases in law and equity rising under the Constitution, and the laws of the United States . . . and to controversies to which the United States will be a party . . ." (Art. III, Sec. 2(1)).

2. Federal Statutes and Regulations:

The Appendix sets forth the pertinent provisions of the Federal Statutes providing for:

(a) A District Court of Three Judges in Constitutional cases, 28 U. S. C., §§ 2282 and 2284 (33a & 34a);

(b) Original jurisdiction of the Federal District Courts in Federal question cases, 28 U. S. C., § 1331 (36a);

(c) Appellate jurisdiction of the Circuit Court of Appeals over final orders of the District Court refusing injunctions, 28 U. S. C., § 1291 (36a);

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* All such references are to the pages of Petitioner's Appendix.

(d) The powers of the Federal Appellate Courts, 28 U. S. C., § 2106 (37a);

(e) The pertinent provisions dealing with extortionate credit transactions alleged below to be unconstitutional, 18 U. S. C., §§ 891, 892 and 894 (38a);

(f) Pertinent sections dealing with Certiorari, 28 U. S. C., § 1254(1), (37a).

STATEMENT OF THE CASE.

1. Importance of the Case.

This Petition for Certiorari is the last opportunity for Petitioners to vindicate their rights of access to the Federal Courts in order to litigate their claim of immediate and irreparable harm imposed upon them by the enforcement against them of an act of Congress, which they allege to be unconstitutional (18 U. S. C., §§ 891, 892 and 894) (38a). It presents questions of importance to the administration of justice throughout the Federal System, because it seeks review by this Court in order to bring some definitive guides to effect an escape from the "procedural and jurisdictional morass into which litigants may be lead by the troublesome Three-Judge Court Statutes" that the Third Circuit Court of Appeals recognized in their opinion below (28a); a morass complained of by Chief Judge Brown in *Mayhue's Liquor Store v. Meiklejohn*, 426 F. 2d 142 (1970) as the "confusion inherent in the Three-Judge Statutes and their application to present-day problems". (at 144).

It seeks a resolution of conflicts among the Circuits on the role of the single Judge in convening a Three-Judge Court; a resolution of a conflict arising between the Third Circuit Court and the decision of this Court in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U. S. 713 (1962); and it seeks review of the anomalousness of now which flows from the action of the Highest Appellate Court of the land, open as of right to the Petitioners, in affirming the dismissal of their law suit, when no responsive pleading was ever made to their Complaint.

2. Nature of the Case.

This is an action for injunctive relief, seeking an order restraining the Appellees, Law Enforcement Officers of the

United States, from enforcing by way of further proceedings in a pending criminal action (Criminal No. 545/69 in the District Court for the District of New Jersey), or in any other way, certain provisions of Title 18 U. S. C., §§ 891, 892 and 894 against the Petitioners, because they claim these provisions to be unconstitutional because violative of the Ninth and Tenth Amendments to the United States Constitution. Petitioners filed a Complaint in Equity on March 30, 1970 alleging their indictment and that the charges were unconstitutional, and claiming that the enforcement against them by way of indictment of these provisions resulted in the spending of money in the preparation of a defense to the charges, and claiming grave personal inconvenience, and interruption of their life style resulting from the necessity of doing all things to prepare a defense to the charges, and the claiming of grave personal anxiety resulting from the doing of all things necessary to prepare a defense to the charges.

The Complaint was served by the Marshall on all parties named as Defendants. The action was assigned by the President Judge of the United States District Court for the District of New Jersey to the Honorable Leonard I. Garth, who was the same Judge assigned to hear the criminal actions. At the same time as the filing of the Complaint, Petitioners moved for the convening of a Three-Judge District Court, under 28 U. S. C., § 2284. Petitioners also moved for a Preliminary Injunction to restrain the criminal action from proceeding, pending the disposition of their suit in equity. This was addressed to the Three-Judge Court which they had moved to convene. Before any responsive pleading was made by or on behalf of any of the Defendants to the suit in equity, Judge Garth asked Petitioners, through their Counsel, to present argument on the question of whether or not their Complaint raised a

substantial constitutional question as to the validity of the provisions attacked as unconstitutional. A Brief was submitted to the Court, addressing itself to the question of the substantiality of the Constitutional questions presented, and Petitioners, through Counsel, were invited to be heard in oral argument on that question. The Defendants named in the Petitioners' Complaint were represented at the argument on the question of the substantiality of the Constitutional questions—by Attorneys from the Strike Force against Organized Crime for New Jersey, who in oral argument argued that the Complaint did not raise a substantial question of the Constitutional validity of the acts in question, and that in any case there existed for the Petitioners an adequate remedy at law. The District Court dismissed the action, even though no answer or appearance had been made on behalf of the Defendants. And, it dismissed the action, even though it held that the Complaint had raised a substantial Constitutional question concerning the validity of the act. Petitioners appealed to the Third Circuit from the order dismissing their action and from the denial of their Motion to Convene a Three-Judge Court. The Third Circuit affirmed the District Court.

ARGUMENT.

I. The Order of the Circuit Court of Appeals Affirming a Single District Court Judge's Order Dismissing an Action for Injunctive Relief, Seeking to Restrain the Enforcement of an Act of Congress as Unconstitutional, When There Exists a Substantial Question of the Constitutional Validity of Such Act, Draws the Third Circuit into Conflict With Decisions of Other Circuits on the Question of Jurisdictional Requirements for the Convening of a Three-Judge Court.

The Fifth Circuit Court of Appeals in *Hargrave v. McKinney*, 413 F. 2d at 320 (1969) reversed a Single District Judge's refusal to convene a Three-Judge Court and his dismissal of the Petitioners' Complaint for lack of jurisdiction. In doing so, it recognized that the test for the convening of a Three-Judge Court, aside from the substantiality of the Constitutional question presented, was "does the Complaint at least formally allege a basis for equitable relief". It held that a single Judge must, in determining whether the Complaint at least formally alleges a basis for equitable relief, construe the Complaint liberally and take well-pleaded material allegations as admitted. It found that the Compaint in that case at least formally alleged a basis for equitable relief, because in reviewing the allegations, they could not say that there was no reasonably arguable theory from facts which, if proved, would support a decision in favor of the plaintiff. The Third Circuit Court of Appeals in the present case, to the contrary, read more stringent requirements into this Court's test, enumerated in *Idlewild Bon Voyage Liquor Corp. v. Epstein*, than the language of Idlewild itself or the manner in which the Fifth Circuit applied it. Here, recognizing

the Petitioners' claim that they had made allegations of irreparable harm, and recognizing that the petitioners had demanded relief in an area where equity has traditionally been able to afford a remedy; nonetheless, they charge the single Judge with the responsibility of making a judgment, without benefit of an evidentiary hearing, as to how substantive were the allegations of injury and harm made in the Complaint (—(a)). Nor is this the first instance of the Third Circuit deciding in this area of the law in conflict with decisions of other Circuits. In *Sinatra v. New Jersey State Commission*, 311 F. Supp. 678 (1970), that Court, acting through Chief Judge Hastie, reached a conflicting result to the Fifth Circuit in *Mahue Liquor Store v. Micklejohn*, and it specifically recognized that it had chosen a contrary result. The Third Circuit's opinion on the *Sinatra* case points up the split in the Circuits on the question presented in the present case. Judge Brown in *Mahue* points out some of the reasons for these conflicts, saying "As is so often the case in the contemporary efforts of courts to make a little order and efficiency out of the inbuilt chaos from a statutory machine that was not designed for the intense use demanded by today's expanding invocation of federally secured constitutional claims, the underlying substantial question is all but forgotten". He further points out how in these areas consideration of the merits of a claim is inextricably bound up with questions of jurisdiction. And so too is the Second Circuit Court of Appeals in conflict with the Fifth, as is illustrated in *Heaney v. Allen*, 425 F. 2d 869 (1970), (USCA 2nd) in which Judge Friendly declined to adopt the view of Chief Judge Brown in *Jackson v. Choate*, 404 F. 2d 910 (1968), that except in "an open and shut case" it is better "to constitute a Three-Judge Court," and to allow that Court to determine initially whether it should have been constituted. And, both the Second and

Third Circuits are in conflict with the Seventh Circuit in this jurisdictional morass on the point presented in the instant case, as to what constitutes a formal allegation of a basis for equitable relief, see; *National Mobilization Committee to End the War in Viet Nam v. Foran*, 411 F. 2d 934, (USCA 7th) (1970). This Petition presents an ideal vehicle for this Court to set down a rule of law on the function and role of a single District Court Judge deciding whether to convene Three-Judge Courts in Constitutional cases, an area which of itself determines the access of citizens to the Courts of the Federal System.

II. The Affirmal by the Third Circuit Court of Appeals of the Order by a Single District Court Judge Dismissing Petitioners' Action Is in Conflict With the Decision of This Court, in Idlewild Bon Voyage Liquor Corp. v. Epstein.

In *Idlewild*, the single District Court Judge had before him an action to enjoin the application of a State Statute and a Motion to Convene a Three-Judge Court. He refused an injunction then, applying the doctrine of abstention, and retained control of the case. Upon renewed applications before other Courts to convene a Three-Judge Court, *Idlewild*, until reaching this Court, met with denials upon the ground that the original Judge had retained jurisdiction and his ruling was the "law of the case". This Court held that the single Judge, in retaining jurisdiction, had exceeded the powers of the proper function of a single Court Judge. It held that when an application for a Statutory Three-Judge Court is addressed to a District Court, the Court's inquiry is a limited one and set a test, that where there is a substantial Constitutional question presented, the Complaint need allege *at least formally* a basis for equitable

relief. The Third Circuit Court of Appeals assumed (25a) that this Court did not mean what it said. It went on to hold (26a) that the District Court should examine the Complaint for "substantive allegations" which would support a claim for injunctive relief. Such a test cannot be squared with *Idlewild*, for the more that a single Judge examines into the merits of the allegations, the more likely is his judicial determination one contradicting the act of Congress requiring Three Judges to decide on the merits of a Constitutional equity proceeding.

III. The Sanctioning by the Third Circuit Court of Appeals of the Dismissal of the Complaint by a Single District Court Judge, Which Seeks Relief Under Title 28 U. S. C., § 2284, So Far Departs From the Accepted and Usual Course of Judicial Procedure, as to Call for an Exercise of This Court's Power of Supervision.

Title 28 U. S. C. § 2284, set out at (34a), requires a Court of Three Judges to grant or deny relief in actions in which it is sought to enjoin the enforcement of an act of Congress. The Statute is a legitimate exercise by Congress of its powers to determine the types of cases which inferior tribunals to this Court may hear and decide. In short, it is a jurisdictional statute. For any other Court to attempt to exercise jurisdiction where the Congress has specifically excluded the same, is a departure from the accepted and usual course of judicial proceedings. When a single District Court Judge, rather than three Judges, dismisses an action and puts a litigant out of Court, it has in fact exercised the jurisdiction which Congress required that a Three-Judge Court exercise. This Court should review such a departure as an exercise of its power of supervision of all inferior tribunals.

IV. The Sanctioning by the Circuit Court of the Dismissal of Petitioners' Complaint in Equity, When Despite Proper Service of the Same, No Responsive Pleadings Were Ever Made by or on Behalf of Any of the Defendants, Sanctions a Departure by a Lower Court From the Accepted and Usual Course of Judicial Proceedings.

Under the Federal Rules of Civil Procedure, all actions convene with the filing of a Complaint, proper docketing of the same, and service by the proper authority. Thereafter, Courts may not act "sua sponte". For the District Court to dismiss an action properly begun by a Complaint, on its own motion, without action by other parties, so far departs from English speaking people's concept of the accepted and usual course of judicial proceeding, as to call for an exercise of this Court's power of supervision.

CONCLUSION.

Petitioners respectfully pray this Court to issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, and for such other reliefs as may be just and proper.

Respectfully submitted,

FILINDO B. MASINO,
ANTHONY G. BATEMAN,
Attorneys for Petitioners.

APPENDIX A.

United States District Court

DISTRICT OF NEW JERSEY.

CIVIL ACTION NO. 375-70.

CHARLES MAJURI AND JOSEPH CARUANO

v.

UNITED STATES OF AMERICA AND JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES AND FREDERICK B. LACEY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY AND JOHN DOE, ANY FEDERAL LAW ENFORCEMENT OFFICER.

OPINION AND ORDER.

Appearance:

BERK, MASINO AND MOONBLATT, ESQUIRES,
Attorneys for Plaintiffs,

By: FILINDO B. MASINO, ESQUIRE.

GARTH, *District Judge:*

Charles Majuri and Joseph Caruano, the plaintiffs herein, are also defendants, with others, in a criminal proceeding.[1]

1. Majuri and Caruano were indicted with others (who are not parties to the instant Civil Action) by a Federal Grand Jury sitting in Newark, New Jersey, on December 16, 1969. The Indictment, Criminal No. 545-69 charged *inter alia* violations of Sections 891, 892 and 894 of Title 18 United States Code.

In this action, the plaintiffs seek to have a statutory Three-Judge Court convened and an injunction issue which would restrain the enforcement of 18 U. S. C. 391, 892 and 894. It is claimed that these statutes, under which they are indicted, do not charge an offense cognizable under the United States Constitution and are repugnant to the 9th and 10th Amendments thereof. Essentially, the plaintiffs argue that Congress, without constitutional authority, has attempted to legislate upon intrastate matters, and they attack the statute, in its form, for a lack of interstate character.

The complaint and motions filed for the convening of a statutory Three-Judge Court pursuant to 28 U. S. C. §§ 2282 and 2284, and for a preliminary injunction, were supported by allegations and affidavits that the plaintiffs would suffer irreparable harm, detailed as follows:

(1) unless restrained by this court, the Government will bring the plaintffs herein to trial under the aforesaid indictments;

(2) the plaintiffs have expended and will be obliged in the future to expend great sums of money;

(3) the plaintiffs will be obliged to undergo grave, personal inconvenience and anxiety in the preparation of a defense to the Government's charges;

(4) the issuance of an injunction will not cause undue inconvenience or loss to the Government, but will prevent irreparable harm to the plaintiffs; and

(5) unless the Government is enjoined from prosecution, the plaintiffs will suffer

> ". . . great and irreparable damage in that they believe, upon the advice of Counsel, that Sections 891, 892 and 894 of Title 18, U. S. C. are unconstitutional

and repugnant to the 9th and 10th Amendments to the United States Constitution, and the plaintiffs believe, upon advice of Counsel, that these sections will be so adjudicated upon the convening of a Three-Judge District Court, with the preparation of argument and authorities of law." (Pg. 2, *Plaintiffs' Affidavit in Support of Motion for Preliminary Injunction*).

The plaintiffs assert that the function of the District Court is limited to: (1) determining whether the constitutional question raised is substantial, and (2) whether the complaint at least formally alleges a basis for equitable relief. *Idlewild Liquor Corp. v. Epstein*, 370 U. S. 713, 715 (1962).

I agree with the plaintiffs that I am required to make the threshold determination as to whether the constitutional question raised, is substantial. With respect to that issue I have determined that the attack on the constitutionality of 18 U. S. C. 891, 892 and 894 presents a substantial constitutional question sufficient to convene a statutory Three-Judge Court. I have made this determination acknowledging and recognizing those authorities which have upheld the constitutionality of this same statute.[2]

The more serious question is whether the District Court is limited solely to determine "whether the complaint at least *formally alleges* a basis for equitable relief" (370 U. S. at 715). The plaintiffs would have me read the *Idlewild* decision to mean that one need only *pro forma* allege a basis for equitable relief.

I do not conceive that the role of the single District Judge is that limited or narrow. If the plaintiffs' action

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2. *United States v. Biancofiori*, — F. 2d —, No. 17,655, September Term 1969—January Session 1970, decided February 2, 1970 (7th Cir. 1970); *United States v. Curcio*, — F. Supp. — Criminal 12,625, decided February 24, 1970 (D. Conn. 1970); *United States v. DeLutro*, — F. Supp. —, 69 Cr. 668, decided January 14, 1970 (S. D. N. Y. 1970).

could not be maintained in the absence of any allegation of equitable relief, must it not also fall if the equitable basis alleged is ineffective to invoke the traditional equity jurisdiction of this court? The mere formal allegation of "irreparable harm" without support, cannot in my view, satisfy equity jurisdictional requirements.

Where an absence of federal equitable jurisdiction is found,

> ". . . it would be useless to go to the inconvenience and expense of convening a court of three judges to determine that [an] injunction should not issue . . ." *Independent Gin & Warehouse Co. v. Dunwoody*, 30 F. 2d 306, 307 (M. D. Ala., N. D. 1928).

In *Frankel v. Gardner*, 263 F. Supp. 218 (E. D. Pa. 1966), District Judge Van Dusen refused to convene a Three-Judge Court where there was no present need for injunctive relief since plaintiff had failed to show irreparable injury. See also; *Priceman v. Dewey*, 81 F. Supp. 557 (E. D. N. Y, 1949).

Of particular significance is *Duncombe v. State of New York*, 267 F. Supp. 103 (S. D. N. Y. 1967). *Duncombe* involved an action for a declaration of invalidity of a state law relating to desecration of the American Flag, and for injunctive relief against criminal prosecution. Although the complaint had been drawn with *Dombrowski v. Pfister*, 380 U. S. 479 (1965) in mind, District Judge Bryan refused to convene a Three-Judge Court.

It was pointed out that a single District Judge's role in such a circumstance was not merely to determine whether the complaint raised a substantial federal question, but also to determine whether a basis was set forth for invoking the traditional equity jurisdiction of the federal courts. Thus, said District Judge Bryan, a single District Judge

could dismiss for failure to show irreparable injury or failure to pursue adequate remedies at law.

Under the facts of *Duncombe*, it was felt that plaintiff had failed to show any threatened irreparable injury to federal rights, particularly where a court of equity normally was very reluctant to interfere with state criminal proceedings. Furthermore, the state remedies were adequate and had not been exhausted. See also, *Burmeister v. New York City Police Department*, 275 F. Supp. 690 (S. D. N. Y. 1967); *Ford v. Attorney General of Pennsylvania*, 184 F. Supp. 129 (E. D. Pa.) *aff'd. per curiam*, 364 U. S. 291 (1960) and *Dombrowski v. Pfister*, 380 U. S. 479, 489 (1965).

Reed Enterprises v. Corcoran, 354 F. 2d 519 (D. C. Ct. of App. 1965) involved a mandamus proceeding to require the convening of a Three-Judge Court. Plaintiffs, book distributors and publishers, sought to convene a Three-Judge Court to test the validity of the 1958 venue amendment to federal obscenity statute.

The Government sought dismissal on the ground that, *inter alia*, the constitutionality of the 1958 Amendment could be tested in the criminal proceedings which had already been brought in the districts of delivery of the allegedly obscene matter.

Circuit Judge J. Skelly Wright initially found that a substantial federal question was present. The complaint formally alleged a basis for equitable relief which, since not obviously colorable, was to be taken as true. Hence, a Three-Judge Court was deemed necessary. He went on to state that:

> "The Government's suggestion that petitioners have an adequate remedy at law in the criminal proceedings now pending against them, while perhaps appropriate in cases outside the First Amendment area [this case

involved First Amendment rights] where a single prosecution is contemplated, is unavailing here . . . ." (354 F. 2d at 523)

For the reasons which are expressed here, it is my view that the "perhaps" in Judge Wright's opinion in *Reed* should be deleted. Such a view is not inconsistent with 28 U. S. C. § 2284(5), which obviously applies to situations occurring subsequent to the convening of the Three-Judge Court.

With these concepts in mind, I have reviewed the record before me. There are no First Amendment rights alleged to be involved. Cf. *Reed Enterprises v. Corcoran*, *supra*. The plaintiffs, as defendants in the criminal proceeding aforesaid (Crim. No. 545-69) have a motion pending in the Criminal Action, to dismiss so much of the Indictment as charges them with violations of 18 U. S. C. 891, 892 and 894. Their motion in the criminal proceeding asserts the same grounds of unconstitutionality as they assert here. The plaintiffs' rights will be adequately vindicated through that course, thus providing plaintiffs with an adequate remedy at law. It should also be noted that plaintiffs are not confined to a prison but are free on bail.

Plaintiffs' allegations as to irreparable harm do not provide them with grounds for relief in equity.

". . . No citizen or member of the community is immune from prosecution, in good faith, for his alleged criminal acts. The imminence of such a prosecution even though alleged to be unauthorized and hence unlawful, is not alone ground for relief in equity which exerts its extraordinary powers only to prevent irreparable injury to the plaintiff who seeks its aid . . ." *Beal v. Missouri Pacific R. Co.*, 312 U. S. 45, 49 (1941).

The plaintiffs do not allege any more than an "injury other than that incidental to every criminal proceeding brought lawfully and in good faith." See *Dombrowski v. Pfister, supra* at 489. Nor can it be said that the mere expenditure of money in connection with their defense in and of itself constitutes that character of irreparable harm cognizable here.

Since the plaintiffs have failed to establish adequate grounds for equity jurisdiction, one of the essential requirements for the convening of a statutory Three-Judge Court has not been met. The plaintiffs' motion for the convening of a Three-Judge Court is therefore denied, plaintiffs' motion for injunction is denied and plaintiffs' complaint is dismissed.[3]

LEONARD I. GARTH,
Leonard I. Garth,
United States District Judge.

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3. For an interesting analysis of the problems involved herein, see 77 Harv. L. Rev. 299, 309 *The Three-Judge District Court: Scope and Procedure Under Section 2281.* See also *32 Univ. of Chicago L. Rev. 1, 25.*

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,903 & 18,904

CHARLES MAJURI and JOSEPH CARUANO

v.

UNITED STATES OF AMERICA, JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, FREDERICK B. LACEY, UNITED STATES ATTORNEY FOR THE DISTRICT OF NEW JERSEY, AND JOHN DOE, ANY FEDERAL LAW ENFORCEMENT OFFICER.
JOSEPH CARUANO, *Appellant* in No. 18,903
CHARLES MAJURI, *Appellant* in No. 18,904

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued June 23, 1970
Before WINTER,* ALDISERT and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed August 17, 1970)

GIBBONS, *Circuit Judge.*

On December 16, 1969 a Federal Grand Jury sitting at Newark, New Jersey, handed up a seven count indictment

* Circuit Judge of the Court of Appeals for the Fourth Circuit, sitting by designation.

(Crim. No. 545-69) against appellants, Majuri and Caruano, along with others not parties to this action. Three counts of that indictment charged appellants with conspiracy to make, the making of, and the collection of extortionate extension of credit, in violation of 18 U. S. C. §§ 891, 892 and 894 (Supp. V, 1970). That criminal case was routinely assigned to the Honorable Leonard I. Garth for pretrial motions, and he directed a time schedule for the orderly filing, briefing and argument of such motions. In the criminal case the defendants have filed a motion to dismiss so much of the indictment as charges them with violations of 18 U. S. C. §§ 891, 892, and 894, on the ground that those sections of Title 18 were enacted by Congress without constitutional authority and in violation of the Ninth and Tenth Amendments to the United States Constitution. Their contention is that Congress is without power to prohibit intrastate loansharking.

Appellants' motion to dismiss the loansharking counts of the indictment is still pending and undecided in the district court, solely because of the pendency of the civil action in which this appeal arises. On March 30, 1970, appellants filed a complaint alleging the fact of indictment Crim. No. 545-69, and:

> 4. Plaintiffs alleged that Sections 894, 892 and 894 of Title 18, United States Code, are repugnant to the 9th and 10th Amendments to the United States Constitution, in that they are vague, speculative, and do not charge an offense cognizable under the United States Constitution.
>
> 5. Plaintiffs allege that unless the defendants are restrained from enforcement of these provisions, the plaintiffs will suffer severe and irreparable harm, as more fully set forth in the affidavits attached hereto.

Appendix at 19.

In the affidavits referred to, Majuri and Caruano allege their indictment, that they have been arrested, and that they are free on substantial bail awaiting trial. They also allege:

> 3. As a consequence of the same, they have already expended, and will be in the future obliged to expend, great sums of money, as well as to undergo grave personal inconvenience and anxiety in the preparation of a defense to these charges.
>
> 4. Unless the Defendants are enjoined and restricted from committing the threatened acts, the Plaintiffs will suffer great and irreparable damage in that they believe, upon the advice of counsel, that Sections 891, 892, and 894 of Title 18, U. S. C. are unconstitutional and repugnant to the 9th and 10th Amendments to the United States Constitution. . . . .

Appendix at 24-25.

Defendants in this civil action are described in the complaint as "the sovereign, and Law Enforcement Officials charged with the Prosecution of these matters." The prayer for relief seeks a preliminary and a permanent injunction restraining the defendants from proceeding with "any prosecution based on the provisions of Sections 891, 892 and 894. . . . ."

With the complaint and affidavits, appellants filed a motion pursuant to 28 U. S. C. § 2284 (1964) for the convening of a three judge district court and a motion for a preliminary injunction. The civil action was also assigned to Judge Garth. Both motions were heard by him on April 13, 1970. No answering pleadings were filed but the United States Attorney appeared and filed an extensive memorandum raising legal issues as to the sufficiency of the complaint in several particulars.

The government contended (1) that the claim of unconstitutionality is so insubstantial as to be frivolous, and (2) that the complaint and affidavits show no basis for equitable relief. On May 7, 1970 the district court filed a memorandum and order disposing of these contentions. Recognizing that those courts which had considered the constitutionality of the subject statutes had uniformly upheld them,[1] it found, nevertheless, that the constitutional issue was at least sufficiently substantial to be beyond the province of a single judge. On the second issue, however, it held that the complaint failed to allege facts sufficient to invoke traditional equitable jurisdiction. Therefore, it denied injunctive relief, denied appellants' motion to convene a three judge court, and dismissed the complaint.

Appellants filed notices of appeal and on May 19, 1970, applied to a panel of this court for injunctive relief pending appeal and for a stay of the judgment of the district court. The panel ordered an accelerated briefing schedule and referred those motions to the panel which would hear argument on the merits.

Although it was not always so,[2] it is now clear that, at least in cases where, as here, the district court enters an appealable order, review of a refusal to convene a three judge court lies in this court. *Gunn v. University Committee*, 38 U. S. L. W. 4685 (U. S. June 29, 1970); *Mengelkoch v. Industrial Welfare Commission*, 393 U. S. 83 (1968); *Wilson v. City of Port Lavaca*, 391 U. S. 352 (1958); *Schnackman v. Arnebergh*, 387 U. S. 427 (1967); *Buchanan v. Rhodes*, 385 U. S. 3 (1966); *Idlewild Bon Voyage*

1. *United States v. Perez*, No. 33,767 (2 Cir., May 1, 1970); *United States v. Biancofiore*, 422 F. 2d 584 (7 Cir. 1970); *United States v. Curcio*, 310 F. Supp. 351 (D. Conn. 1970); *United States v. Calegro De Lutro*, 309 F. Supp. 462 (S. D. N. Y. 1970).

2. *Stratton v. St. Louis S. W. Ry.*, 282 U. S. 10 (1930), *Ex parte Metropolitan Water Co.*, 220 U. S. 539 (1911); *Miller v. Smith*, 236 F. Supp. 927 (E. D. Pa. 1965).

Liquor Corp. v. Epstein, 370 U. S. 713 (1962). Since in this case we affirm that refusal, we need not now decide whether or not there is jurisdiction in the court of appeals to grant preliminary injunctive relief pending appeal, or equivalent preliminary relief within the federal judicial system by way of mandamus pending appeal, or mandamus relief in the absence of an appealable order.[3]

Appellants contend that having found the federal constitution question to be at least not frivolous, the district court should have made no further inquiry, but should thereupon have entertained the request for a three judge court as a matter of form. Principal reliance for this position is upon the language of *Idlewild Bon Voyage Liquor Corp. v. Epstein*, *supra* at 715:

> When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint *at least formally* alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute. (Italics added.)

Appellants emphasize that their prayer for relief asks for an injunction, that the complaint contains the words "irreparable injury" and that this is all the Supreme Court intended to require by the language "at least formally alleges a basis for equitable relief."

We do not agree. It is clear that in determining the substantiality of the claimed constitutional question the

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3. See *Gunn v. University Committee*, *supra*; *Jackson v. Choate*, 404 F. 2d 910, 912 (5 Cir. 1968); *Lyons v. Davoren*, 402 F. 2d 890, 892 (1 Cir. 1968), *cert. denied*, 393 U. S. 1081 (1969); *Sinatra v. New Jersey State Commission*, 311 F. Supp. 678 (D. N. J. 1970).

district court makes a judicial decision. *Schneider v. Rusk*, 372 U. S. 224 (1963); *Ex parte Poresky*, 290 U. S. 30 (1933); *Fiumara v. Texaco, Inc.*, 240 F. Supp. 325, 326 (E. D. Pa. 1965); *Miller v. Smith*, *supra* note 2. Its function is analogous to that of a court reviewing a complaint for legal sufficiency under Rules 12(b)(1) or 12(b)(6) of the Fed. R. Civ. P. *Hargrave v. McKinney*, 413 F. 2d 320, 324 (5 Cir. 1969). We cannot attribute to the Supreme Court the intention, in the same sentence of *Idlewild Bon Voyage Liquor Corp. v. Epstein*, *supra* at 715, to distinguish between the district court's role in determining substantiality of a constitutional question and its role in determining the existence of a ground for equitable relief. Both decisions are judicial rather than ministerial. Both require that the district court look beyond the prayer for relief to the substantive allegations of the complaint.

Appellants suggest, however, that the decision as to substantiality of the federal constitutional question is "jurisdictional", at least in non diversity cases, whereas a decision that the complaint fails to state a claim for equitable relief is a decision "on the merits" and hence one which by virtue of 28 U. S. C. § 2284 a single judge may not make. But it seems to us that a decision that a claimed question of constitutional law is insubstantial is even more clearly on the merits, and such decision is now a firmly established duty of a single district court judge. A finding of insubstantiality of the constitutional question is, moreover, one involving a more sophisticated judgment than that required to determine whether or not a complaint states a cause of action for injunctive relief. Over recent history far greater growth and change has taken place, and undoubtedly will continue to take place, in federal constitutional law than in the law of equitable remedies.

We agree, therefore, that it was the district court judge's duty to examine the complaint for substantive alle-

gations which would support a claim for injunctive relief, and not to look merely at the prayer for relief and the conclusive allegation of irreparable injury.

Appellants are not faced with the choice of committing a violation of the criminal statute in order to test their constitutional contentions. There is no allegation that the pendency of the criminal charge inhibits them from engaging in protected activities. They do not allege that they should be free to continue intrastate loansharking. They say, only, that it is inconvenient and expensive to raise their constitutional contentions by appropriate pretrial and trial motions in the criminal case, though they have in fact done so. They do not even explain how it will be any less expensive to try the constitutional issues in this civil case than in the criminal case.

The district court, referring to *Dombrowski v. Pfister*, 380 U. S. 479 (1965), and *Reed Enterprises v. Corcoran*, 354 F. 2d 519 (D. C. Cir. 1965), stressed in its memorandum the absence of any alleged infringement of first amendment rights. While activities protected by the first amendment are a common basis for injunctive relief against actual or threatened criminal prosecution, they are not the only activities worthy of such protection in appropriate circumstances. See e.g., *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 98 (1949); *Cline v. Frink Dairy Co.*, 274 U. S. 445, 451 (1927); *Pierce v. Society of Sisters*, 268 U. S. 510, 535 (1925); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497, 500 (1925); *Terrace v. Thompson*, 263 U. S. 197, 214 (1923); *Truax v. Raich*, 239 U. S. 33, 37 (1915). We do not, by affirming, therefore, suggest agreement with a possible interpretation of the district court opinion, that first amendment rights are a *sine qua non* for injunctions against criminal prosecutions.

But, where, as here, the only allegation advanced in support of an injunction against a pending federal criminal

prosecution is the inconvenience of that trial and the preference for a civil remedy before three judges instead of one, the complaint fails to state a claim for injunctive relief, and does not fall within the province of 28 U. S. C. §§ 2282 and 2284.

What is here approved is a judicious screening by the district courts of applications for three judge panels. That screening should be done cautiously, of course, because of the procedural and jurisdictional morass into which litigants may be led by these troublesome three judge court statutes. 28 U. S. C. §§ 2281, 2282, and 2284. But the role of the single district judge should be more than a conditioned reflex to such an application, especially now that the Supreme Court has provided for judicial review in the circuit courts of appeals at least when an appealable order has been entered.[4] In most if not all cases, refusal to convene a three judge court will be accompanied by the denial of a preliminary injunction and hence will be appealable. 28 U. S. C. § 1292 (1964).

One other problem remains. The district court not only denied appellants' motions to convene a three judge court and to grant a preliminary injunction, but also dismissed the complaint. On another record the latter step might well be questionable, since it would dispose, without hearing, of a possible claim for declaratory relief. See Note, the Federal Anti-Injunction Statute and Declaratory Judgments in Constitutional Litigation, 83 Harv. L. Rev. 1870 (1970). Such relief, assuming subject matter jurisdiction, would be available from a single judge. But the Declaratory Judgment Act, 28 U. S. C. §§ 2201-02 (1964), is limited in operation to those cases which would be otherwise within the jurisdiction of the federal courts. Jurisdiction in this case depends upon 28 U. S. C. § 1331 (1964), and there is no allegation in the complaint or affidavits of the

4. See cases cited p. 5, supra.

requisite jurisdictional amount. The situation might be different if the suit challenged a state statute and jurisdiction were asserted under 28 U. S. C. § 1343 (1964). *Hague v. C. I. O.*, 307 U. S. 496, 513 (1939). The complaint here was properly dismissed. The order of the district court will be in all respects affirmed. All motions made in this court and not heretofore disposed of will be denied.

APPENDIX C.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Nos. 18903 and 18904.

CHARLES MAJURI AND JOSEPH CARUANO

v.

UNITED STATES OF AMERICA, JOHN N. MITCHELL, ATTORNEY GENERAL OF THE U. S. FREDERICK B. LACEY, UNITED STATES ATT'Y FOR THE DISTRICT OF NEW JERSEY, AND JOHN DOE, ANY FEDERAL LAW ENFORCEMENT OFFICER

JOSEPH CARUANO, *Appellant in No. 18,903*

CHARLES MAJURI, *Appellant in No. 18,904*

(D. C. Civil Action No. 375-70.)

Present: WINTER*, ALDISERT and GIBBONS, *Circuit Judges.*

ORDER.

It is ORDERED that appellants' motions for injunctive relief pending appeal and for stay of judgment of the District Court in the above cases be, and hereby are denied, in accordance with the opinion of this Court.

ATTEST:
THOMAS F. QUINN,
Clerk.

Date: August 17, 1970.

* Circuit Judge of the Court of Appeals for the Fourth Circuit, sitting by designation.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 18903 and 18904.

CHARLES MAJURI AND JOSEPH CARUANO

v.

UNITED STATES OF AMERICA, JOHN N. MITCHELL, ATTORNEY GENERAL OF THE U. S. FREDERICK B. LACEY, UNITED STATES ATT'Y FOR THE DISTRICT OF NEW JERSEY, AND JOHN DOE, ANY FEDERAL LAW ENFORCEMENT OFFICER

JOSEPH CARUANO, *Appellant in No. 18,903*
CHARLES MAJURI, *Appellant in No. 18,904*

(D. C. Civil Action No. 375-70.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

Present: WINTER*, ALDISERT and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

* Circuit Judge of the Court of Appeals for the Fourth Circuit, sitting by designation.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed May 7, 1970, be, and the same is hereby affirmed. Costs taxed in favor of appellees.

ATTEST:

THOMAS F. QUINN,
Clerk.

August 17, 1970.

APPENDIX E.

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§ 2282. Injunction Against Enforcement of Federal Statute; Three-Judge Court Required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

APPENDIX F.

§ 2284. Three-Judge District Court; Composition; Procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom

the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State. June 25, 1948, c. 646, 62 Stat. 968; June 11, 1960, Pub. L. 86-507, § 1(19), 74 Stat. 201.

APPENDIX G.

§ 1331. Federal Question; Amount in Controversy; Costs.

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interests and costs the district court may deny costs to the plaintiff and, in addition may impose costs on the plaintiff. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub. L. 85-554, § 1, 72 Stat. 415.

APPENDIX H.

§ 1291. Final Decisions of District Courts.

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

APPENDIX I.

§ 2106. Determination.

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c. 646, 62 Stat. 963.

APPENDIX J.

§ 1254. Courts of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

APPENDIX K.

CHAPTER 42.—EXTORTIONATE CREDIT TRANSACTIONS.

§ 891. Definitions and Rules of Construction.

For the purposes of this chapter:

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

§ 892. Making Extortionate Extensions of Credit.

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business

at the time the extension of credit was made.

* * *

§ 894. Collection of Extensions of Credit by Extortionate Means.

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension of credit in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

APPENDIX L.

AMENDMENT IX—CONSTRUCTION OF ENUMERATED RIGHTS.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

APPENDIX M.

AMENDMENT X.—RESERVED POWERS TO STATES.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1976

CHARLES MATUS AND [illegible]

Petitioners,

v.

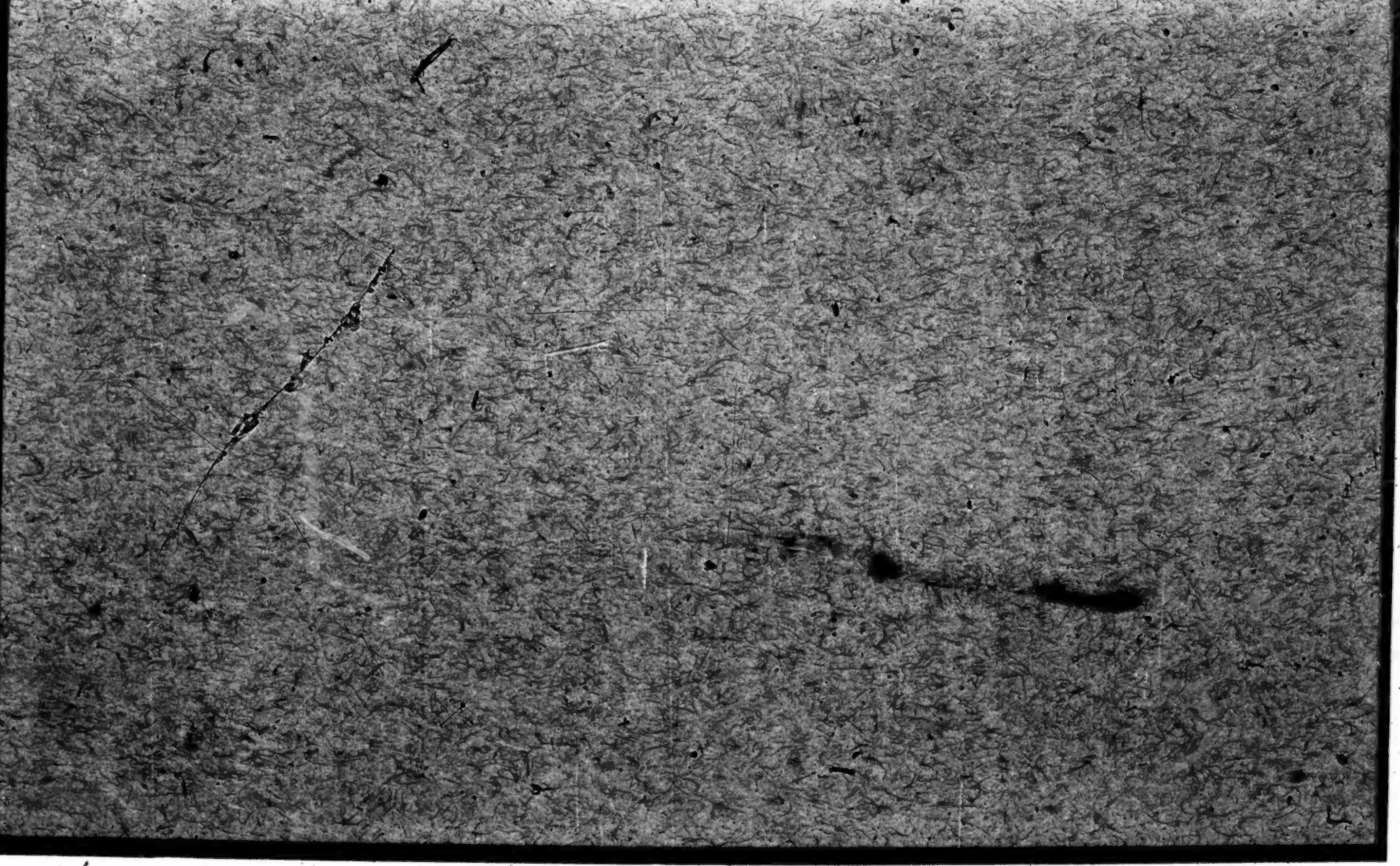
[illegible]

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE [illegible]

MEMORANDUM FOR THE [illegible] IN OPPOSITION

[illegible]



In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 699

CHARLES MAJURI AND JOSEPH CARUANO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were indicted in the United States District Court for the District of New Jersey for violations, *inter alia,* of the Extortionate Credit Transactions Act, 18 U.S.C. (Supp. V) 891, 892, 894. They filed a pretrial motion to dismiss the indictment insofar as it relates to these violations, alleging that the Act, passed in 1968, is beyond the power of Congress under the Commerce Clause and infringes upon rights reserved to the States. That motion remains pending in the district court, where it is scheduled to be considered on October 16, 1970, unless petitioners succeed on their application in this Court for a stay of such consideration.

406-546—70